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Nos. 82-524, 82-545 and 82-551

In the Supreme Court of the United States

October Term, 1982

BALTIMORE GAS AND ELECTRIC COMPANY, ET AL., *Petitioners,*

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *Respondent.*

UNITED STATES NUCLEAR REGULATORY COMMISSION and UNITED STATES OF AMERICA, *Petitioners,*

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL., *Respondents.*

COMMONWEALTH EDISON COMPANY, ET AL., *Petitioners,*

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL., *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF AMICUS CURIAE KANSANS FOR SENSIBLE ENERGY IN SUPPORT OF RESPONDENT

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BRIEF OF AMICUS CURIAE KANSANS FOR SENSIBLE ENERGY IN SUPPORT OF RESPONDENT

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus is an environmental group in the State of Kansas whose members are concerned about the quality of the environment and energy policy within this State and the United States in general. Specifically, Kansans for Sensible Energy (KASE) is involved in the licensing proceedings for the Wolf Creek Nuclear Power Plant, which is being constructed at Burlington, Kansas. The members of KASE and Kansans in general also have been concerned about the possibility of using the abandoned salt mine at Lyons, Kansas as a nuclear waste disposal site.

KASE is interested in two aspects of the generation of nuclear waste and its subsequent disposal: (1) the fact that until a waste disposal repository is established, the waste will have to remain on site at the individual nuclear power plants, and (2) the location of the site where the repository will be established and the environmental effects associated with such establishment. These concerns directly affect the members of KASE. The Wolf Creek Nuclear Plant at Burlington, Kansas is scheduled to begin operation in 1985 and, of course, will begin generation of a considerable amount of nuclear waste, which will have to be stored on site unless some type of repository has been established.

Even if, or when, a repository is established, the members of KASE will still be affected and will still have significant concerns. The waste from Wolf Creek will have to be transported to the storage site, and the wastes from other power plants across the country no doubt will be traveling through the State.

In addition to these concerns, KASE has a special interest in the establishment of a high level waste disposal repository because of the attempt by the Atomic Energy

Commission (AEC) to establish such a repository in the salt mines at Lyons, Kansas in the early 1970's. We feel that the close familiarity with the Lyons experience gives us a special insight into the environmental risks that are encountered in establishing a waste disposal site.

SUMMARY OF ARGUMENT

The Original, Interim, and Final versions of Table S-3 are invalid under the National Environmental Policy Act (NEPA), 42 U.S.C. §4321 *et seq.* because the rules do not take into account either generically or at the licensing stage of nuclear power plants the significant risks that the generation of high level nuclear waste imposes upon present and future generations. We wish specifically to concentrate upon the impacts that the generation of nuclear waste has upon future generations and on the issue of the environmental impacts which would occur if no permanent repository is established in the near future.

First, we will argue that contrary to the arguments of Petitioners and Judge Wilkey in his dissent below, the uncertainty of whether nuclear waste will be stored safely is an environmental "cost" which must be factored into the cost/benefit analysis at some stage of the proceeding. In making this argument we will demonstate that the generation of nuclear waste is qualitatively different than most other actions affecting the environment because of its direct impacts upon numerous future generations, and thus, the risk created by the possibility of it not being stored safely must be considered and disclosed in such a way that the effects are integrated into the decisionmaking process.

Second, the Commission attempts to justify Table S-3 by arguing that its assessments of the environmental effects of the generation of nuclear waste is overall conservative.

This type of analysis, however, would allow an agency to ignore significant environmental effects, and thus, such a technique is a blatant violation of the National Environmental Policy Act, 42 U.S.C. §§4331 & 4332 (1976) (NEPA).

Third, Table S-3 by stating that there will be no release to the environment from nuclear waste solids has failed to satisfy the NEPA mandate that the adverse environmental effects of an action be disclosed to the public. This disclosure is necessary to ensure that the public's responsibility to future generations in regard to the environment is satisfied.

Fourth, given that presently no permanent repository has been established, the uncertainty of whether such a site will be established must also be considered in the decisionmaking process and disclosed to the public in a meaningful way. If no site is established in the near future significant environmental effects will occur on site at the individual nuclear power plants. Contrary to the arguments of Petitioners, the Commission has not adequately considered these uncertainties and certainly has not disclosed them in Table S-3.

ARGUMENT

I. THE COURT OF APPEALS DID NOT IMPROPERLY SUBSTITUTE ITS JUDGMENT FOR THAT OF THE COMMISSION BY HOLDING THAT THE UNCERTAINTY CREATED BY THE GENERATION OF NUCLEAR WASTE IS AN ENVIRONMENTAL EFFECT WHICH MUST BE CONSIDERED AND DISCLOSED DURING THE LICENSING OF A NUCLEAR POWER PLANT.

Judge Bazelon, in the majority opinion below, held that, as a factual finding, the zero-release value in Table S-3 was not supported by the record, and thus, was arbitrary and capricious. (Pet. App. 42a) Judge Wilkey argued in his dissent (Pet. App. 118a, 162a-180a) and the Petitioners now argue that Judge Bazelon improperly substituted his judgment for that of the Commission. Essentially, their argument boils down to the assertion that the record demonstrates that the Commission considered in great detail the uncertainties and risks of nuclear waste disposal and determined that the impact to the environment was negligible. In making this argument, however, the Petitioners and Judge Wilkey misconstrued the nature of Judge Bazelon's holding.

What Judge Bazelon in fact held was that NEPA requires under Section 102(2)(C) that an agency must consider and factor into the decisionmaking process "significant environmental risks—probabilities or possibilities of environmental damage." (Pet. App. 36a) He then shows that Table S-3 ignores significant risks to the environment from the generation of nuclear waste. (Pet. App. 36a-42a)

Respondent, NRDC, and supporting *Amici* have extensively detailed the numerous risks and uncertainties

created by the generation of nuclear waste and the significant uncertainties that either a repository will not be established in the near future, if at all, or that once a repository is established that it will not work as expected.[1] We intend to address an underlying issue regarding the type of uncertainty involved in nuclear waste disposal.

Judge Wilkey in his dissent below (Pet. App. 171a) and the Petitioners, at least implicitly, argue that Judge Bazelon has ruled that an agency cannot proceed in the face of uncertainty. Judge Wilkey then proceeded to cite numerous instances, in our everyday lives, e.g. driving a car, where human beings encounter uncertainties, but still make plans and perform actions in the face of that uncertainty. (*Id.*) Petitioners argue that the future to a large extent is unknowable, at least the distant future, and that an agency cannot stand still doing nothing because of this uncertainty. They must be able to make plans and proceed in the face of this uncertainty, revising their plans as more information is obtained. (See Petitioners Baltimore Gas and Electric Co., *et al.* at 26; Petitioners Commonwealth Edison Co., *et al.* at 23)

What both Judge Wilkey and the Petitioners ignore, however, is that in the majority opinion below, Judge Bazelon explicitly recognized this dilemma and rejected the proposition that the agency could not proceed in the face of uncertainty. Rather, he only held that under NEPA the Commission must consider and disclose these uncertainties in such a way that (1) the significant risks to the environment are factored into the decisionmaking process and (2) that the public is informed that the action creates these risks and uncertainties. (Pet. App. 48a-49a, n. 134)

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1. As Judge Bazelon noted, the Commission itself admitted that there were significant uncertainties about whether the waste disposal program would be successful. Pet. App. 41a.

The zero-release value in Table S-3 does neither because the uncertainties involving waste disposal play no role in the decision to license a nuclear power plant and the risks that the nuclear power plant will create are not disclosed in any way so that the public can meaningfully participate in the licensing proceedings. (*Id.* at 48a)

The important point to understand, however, is the specter that Judge Wilkey and the Petitioners are trying to raise regarding the implications of Judge Bazelon's opinion. As noted above, they are attempting to show that Judge Bazelon substituted his judgment for the Commission's by holding that an action could not proceed in the face of uncertainty. They then argue either that this is unrealistic or that all of us make plans and act upon them everyday in the face of much uncertainty. (Pet. App. 171a-181a) In making this argument, however, Judge Wilkey and Petitioners fail to appreciate a significant distinction between the uncertainty at issue here and the uncertainty alluded to in the examples they employ.

The generation of nuclear waste creates significant risks to the environment, as this Court recognized in *Vermont Yankee*.

> Vermont Yankee will produce annually well over 100 pounds of radioactive wastes, some of which will be highly toxic. The Commission itself, in a pamphlet published by its information office, clearly recognizes that these wastes "pose the most severe potential health hazard . . . (citation omitted)". Many of these substances must be isolated for anywhere from 600 to hundreds of thousands of years. It is hard to argue that these wastes do not constitute "adverse environmental effects which cannot be avoided should the proposal be implemented", or that by operating nuclear power

> plants we are not making "irreversible and irretrievable commitments of resources". (Citations omitted.)[2]

The uncertainty that arises is *not* whether an action or some external event will produce some harm; rather it is the uncertainty whether the harm already created by the generation of nuclear waste can be *alleviated* or *prevented* by safely disposing the waste. In all the actions postulated by Judge Wilkey, e.g. driving a car, the uncertainties that arise are either whether the action itself will cause harm, or whether some external event will cause harm. (See Pet. App. 171a)[3]

NRDC from the outset has attacked Table S-3 because it failed to allow consideration and disclosure of the environmental effects of a nuclear power plant producing high level waste. (Pet. App. 13a-14a) The Commission has indicated that they hope to bury this waste, thereby preventing any harm from occurring. They admit, however, that there are uncertainties about whether such a disposal program will be successful. (Pet. App. 41a) NEPA in

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2. *Vermont Yankee Nuclear Power Corp. v. National Resource Defense Council, Inc.*, 435 U.S. 519 (1978).

3. There is a further distinction between the examples Judge Wilkey cites and the generation of nuclear waste. With the former the class of persons who incur the costs of the action are also the ones who receive the benefits from the action. In the case of the generation of nuclear waste, however, the costs of the action, i.e. the uncertainties regarding the safe disposal of the waste, will fall predominantly upon future generations, while the benefits from nuclear power are received by the present generation. In addition, in Judge Wilkey's examples, the persons who perform the action consent to the incurrence of the costs, e.g. one voluntarily incurs the risks of driving a car; whereas with nuclear waste the risks and uncertainties are imposed upon future generations who in principle cannot and do not consent to the costs incurred. Accordingly, whenever a nuclear power plant is licensed, which will create these effects upon future generations, it is incumbent upon the commission to consider these effects in the decisionmaking process and disclose them to the public so that the interests of these future generations can be protected. See Part III, *supra*.

102(2)(C) demands that all "adverse environmental effects" be considered and disclosed during the licensing stage of a nuclear power plant. *Andrus v. Sierra Club*, 442 U.S. 347, 350 (1979); *Calvert Cliffs' Coordinating Committee, Inc. v. AEC*, 449 F.2d 1109, 1118 (D.C. Cir. 1971). If the disposal program proves to be unsuccessful, adverse environmental effects will occur. Accordingly, NEPA requires this possibility to be considered and disclosed at some point in the licensing process.[4] Table S-3 precludes this consideration and disclosure.[5] Therefore, its promulgation was arbitrary and capricious and not in accordance with law.

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4. It is clear that NEPA requires that the uncertainty of an action must be considered and disclosed in the decisionmaking process. *See Alaska v. Andrus*, 580 F.2d 465, 473 (D.C. Cir.), *vacated and remanded on other grounds sub nom. Western Oil & Gas Ass'n v. Alaska*, 439 U.S. 922 (1978); *Scientists' Institute for Public Information, Inc. v. AEC*, 481 F.2d 1079, 1092 (D.C. Cir. 1973) (SIPI); *North Slope Borough v. Andrus*, 642 F.2d 589, 605 (D.C. Cir. 1980).

5. The Petitioners argue that the Commission has considered these uncertainties in the *Environmental Survey of the Reprocessing and Waste Management Portions of the LWR Fuel Cycle*, NUREG-0116 (Supp. 1 to Wash. - 1248) (1976); *Public Comments and Task Force Response Regarding the Environmental Survey of the Reprocessing and Waste Management Portions of the LWR Fuel Cycle*, NUREG-0126 (Supp. 2 to Wash. - 1248) and the related hearings leading up to the adoption of the values in Table S-3. As Judge Bazelon noted, however, the consideration was done in the abstract in such a way that the uncertainties and accompanying risks could not effect the licensing decision of an individual nuclear power plant. NEPA requires that "adverse environmental effects" be considered in the actual decisionmaking process.

Weinberger v. Catholic Action of Hawaii/Peace Education Project, 454 U.S. 139 (1981); *Andrus v. Sierra Club*, 442 U.S. 347, 350 (1979); *Calvert Cliffs' Coordinating Committee v. AEC*, 449 F.2d 1109, 1118 (D.C. Cir. 1971). In fact, NRC's own regulations implementing NEPA, 10 C.F.R. Part 51, recognize this requirement. 10 C.F.R. 51.20 states that environmental considerations initially are to be done in an Environmental Report; whereas 10 C.F.R. 51.23 requires to the fullest extent practicable that all adverse environmental effects be integrated in the cost-

(Continued on following page)

II. TABLE S-3'S SUPPOSED CONSERVATIVE ASSESSMENT OF THE ENVIRONMENTAL EFFECTS DOES NOT MEET THE REQUIREMENTS OF NEPA IN THAT THE ASSESSMENT IGNORES SIGNIFICANT ENVIRONMENTAL EFFECTS AND IS AN IMPROPER ANALYSIS UNDER NEPA.

As Petitioners, Commonwealth Edison Company, *et al.*, recognized, it is only where the agency generically has determined that the *benefits* of an action outweigh the uncertainties can an agency proceed without considering the uncertainties at a later stage. (Pet. Com. Ed. citing *Alaska v. Andrus*, 580 F.2d at 473-74) The question that naturally arises is what must be balanced to satisfy NEPA. To answer this it would seem that one must look to the *plain* language of NEPA for the answer.[6] In the majority opinion below, Judge Bazelon argued that the Commission could have justified its rules by showing that certain generic benefits outweigh the risks and uncertainties at issue with nuclear waste. He ruled, however, that nothing in the record indicates that this type of balancing was conducted by the Commission, and thus, the zero-release assumption could not be justified on this basis. (Pet. App. 46a)

Footnote continued—

benefit analysis during the licensing stage of an individual plant. It would seem, therefore, that the Commission by its own regulations is required to consider the uncertainties and risks regarding the generation of nuclear waste in such a way that they are integrated into the decision to license a plant, i.e. that at least in a close case that the uncertainties could make a difference in the cost-benefit balance. *Andrus v. Sierra Club, supra; Calvert Cliffs', supra.*

6. The Petitioners are fond of stating that the plain language of NEPA requires this case to be reversed. However, as will be shown in the text below, the Petitioners see what they only wish to see in the plain language of NEPA.

The Petitioners, however, argue that the Commission did balance the uncertainties of nuclear waste in Table S-3 by "offsetting" these uncertainties against the supposed overestimates of pre-sealing releases, the value of which are also contained in the table.[7] Their argument in essence is that the overall value of Table S-3 is conservative, and thus, the zero-release value cannot be singled out as being arbitrary and capricious. However, this conservative argument ignores the plain language of NEPA, which states in section 102(2)(C)(ii & v) that an agency must consider and disclose "any adverse environmental effects which cannot be avoided should the proposal be implemented", and "any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented". Clearly the generation of solid nuclear waste creates such effects, as this Court explicitly recognized in *Vermont Yankee*. The Commission by only analyzing and disclosing by worst-case analysis the effects of the gaseous effluents simply ignored the effects of the solids. Allowing an agency to do this type of analysis would simply frustrate the purposes of section 102(2)(C)(ii & iv) and NEPA in general because an agency could evaluate by worst-case analysis the least harmful effects and then simply fail to consider the most harmful or difficult to analyze effects, arguing on balance that the outcome is conservative. Obviously, this skews the overall cost-benefit analysis in favor of the least harmful effects.

In addition, this type of analysis is deceptive because it allows an agency to hide quite significant and potentially severe risks by simply stating that the probabilities favor the risks not occurring. There is nothing in the record to

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7. *See* Petitioner NRC's brief at 39 h24; Petitioner Commonwealth Edison Company brief at 24.

indicate how the harm, which would occur if the disposal system program in regard to solids is unsuccessful, compared with harm from the gases. Thus, there is nothing to indicate that any balancing of these risks is truly conservative or that the overall effects from the generation of nuclear waste would be negligible.[8]

Finally, this type of analysis by the Commission is in direct violation of 102(2)(C)(iv), which states that an agency must consider "the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity. . .". This section obviously requires that an agency compare the short-term effects with the long-term effects of an action. The Commission by doing worst-case analysis assumed that the gaseous effluents would be released prior to sealing of the solids in the repository. Thus, the agency to some extent considered the short-term effects of the generation of nuclear waste. However, by simply assuming that there would be no long-term effects the Commission in no way did what section 102(2)(C)(iv) requires - an analysis of the relationship of the short-term and long-term

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8. If this analysis is correct, it would seem that the Commission has not acted in *good faith* in evaluating the environmental effects of nuclear waste. The cases are legion that an agency must at a minimum make a good faith effort to determine the environmental effects of an action. *See*, e.g., *Environmental Defense Fund v. Corps of Eng., U.S. Army*, 470 F.2d 289, 296 (8th Cir. 1972); *Sierra Club v. Morton*, 510 F.2d 813, 819 (5th Cir. 1975). In *Silva v. Lynn*, 482 F.2d 1282, 1285 (1st Cir. 1973), the Court stated that "the requirement of a detailed statement helps insure the integrity of the process of decision by precluding stubborn problems or serious criticism from being swept under the rug . . . [i.e.] . . . (t)here must be good faith, reasoned analysis. . ."

Here the Commission, however, while appearing to evaluate the environmental effects by promulgating Table S-3, has in reality hidden certain significant risks from the public to ensure that the balance is tipped in favor of licensing nuclear power plants. *See* SIPI, *supra*, 481 F.2d at 1089, n. 43.

effects.[9] If the Commission had done worst-case analysis on the solids and the accompanying long-term effects, and then determined the value to be zero, there might be some reason to believe that the overall balance struck is conservative. As Judge Bazelon stated, however, no such analysis was done, and the Commission cannot under NEPA simply place a value of zero into Table S-3 unless that value

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9. It would also seem that even if the Commission could show that by doing this type of same side balancing it has considered the relationship of short-term effects to long-term effects in reaching its decision, that may not be sufficient. In section 101(b) of NEPA it states that "it is the continuing responsibility of the Federal Government to use all practicable means . . . (1)(to) fulfill the responsibilities of each generation as *trustee* of the environment for succeeding generations . . ." (Emphasis added). This language suggests that where the impacts of an action fall directly upon future generations that an agency is required to do a cost/benefit analysis specifically in regard to future generations to see whether an equitable balance has been reached.

Senator Jackson stated on the floor of the Senate in support of the passage of NEPA:

> "The needs and aspirations of future generations make it our duty to build a sound and operable foundation of national objectives for the management of our resources for our children and their children. The future of succeeding generations in this country is in our hands. It will be shaped by the choices we make. We will not, and they cannot escape the consequences of our choices." 115 Cong. Rec. 40417 (Dec. 20, 1969).

Hundreds of thousands of years from now, when the effects from the gaseous effluents have long since passed, the costs created by the generation of the nuclear waste solids will still be affecting the persons living at that time. Accordingly, it is clear that in evaluating the environmental effects of this action the Commission cannot simply offset the costs to future generations by comparing them only with the costs or benefits to the present generation, i.e., the pre-sealing values, but must also balance these costs against offsetting costs or benefits specifically incurred or received by future generations. There is nothing in the record indicating that the Commission did this sort of balancing in arriving at the Table S-3 values. Thus, the Commission's zero-release assumption is "not in accordance with law," i.e., NEPA, §§101(b)(1) and 102(2)(C). *See Concerned About Trident v. Rumsfeld*, 555 F.2d 817, 829-30 (D.C. Cir. 1977); SIPI, *supra*, at 1092.

is in fact zero.[10] (Pet. App. 47a) Therefore, the conservative argument by the Petitioners cannot save the promulgation of the rules adopting Table S-3 from being arbitrary and capricious and not in accordance with law.

III. TABLE S-3 VIOLATES NEPA BECAUSE IT FAILS TO DISCLOSE TO THE PUBLIC IN A MEANINGFUL WAY THE RISKS AND UNCERTAINTIES OF NUCLEAR WASTE SO THAT THE PUBLIC CAN FULFILL ITS RESPONSIBILITIES IN REGARD TO FUTURE GENERATIONS.

Table S-3 is also a violation of NEPA because it fails to adequately disclose the environmental effects of nuclear waste, especially in regard to future generations, in such a way that the public can participate meaningfully in the licensing proceeding. In SIPI, *supra*, the court explained why NEPA is a public disclosure law:

> "It is obvious that government programs for development of technology do not proceed in callous disregard of the public welfare. It is equally obvious, however, that in the process of balancing benefits against risks, the government sponsors of technological programs are making decisions as to whether the public may be asked to assume certain risks or burdens which are determined to be 'reasonable' or not 'undue'. Since such determinations are presently made

10. There is another possible method by which the Commission could have legitimately decided the value to be zero. It could have ignored certain benefits generically, or precluded licensing boards from considering certain benefits, thereby "balancing out" the risks and uncertainties it ignored on the cost side. Here, as well, however, there is nothing in the record to indicate that the Commission conducted this type of analysis, either. Thus, the zero-release value is pure speculation and the table is far from being conservative. *See* Pet. App. 44a.

> within small closed circles of experts who have a vested interest in the technology, the basic question is whether the public itself would be willing to assume these risks and burdens for the sake of obtaining the promised benefits." (Citation omitted) So far as the human environment is concerned, NEPA has provided a means of answering this "basic question" by requiring full disclosure to the public and to other entities within government of all environmental effects likely to stem from agency action.[11]

As noted before, the benefits of a nuclear power plant are received by the present generation; whereas the costs fall predominantly upon future generations, who in principle cannot and do not consent to the imposition of the risks upon them.[12] Given that one of the purposes of NEPA is to ensure that the present generation fulfills its trustee obligation to future generations, Section 101(b)(1), it would seem to be even more important that the long-term environmental effects of an action which impacts directly upon future generations be disclosed meaningfully to the public. As trustees, the public has a responsibility to choose for and act in behalf of these future generations. The only way it can fulfill this role is by fully knowing what actions to choose. In this regard NEPA ensures that the public is so informed. SIPI, *supra*, 481 F.2d at 1091, 1098-99. *See also Weinberger v. Catholic Action*, 454 U.S. at 143; *Silva v. Lynn*, *supra*, 482 F.2d at 1285.

The zero-release value in no sense of the word discloses to the public the risks and uncertainties regarding the

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11. SIPI, *supra*, 481 F.2d at 1098-99. This is essentially a restatement of the "we-they" syndrome, which John Hart Ely analyzed in detail in his process oriented book, *Democracy and Distrust*, Ch. 6 (1981).

12. *See* notes 3, 9, *supra*.

danger of nuclear waste to future generations. Thus, the public cannot meaningfully participate in individual licensing proceedings of a nuclear power plant to protect the interests of future generation, which NEPA explicitly requires. Therefore, Table S-3 violates the plain language of NEPA.

IV. TABLE S-3 VIOLATES NEPA BY FAILING TO CONSIDER AND DISCLOSE THE SIGNIFICANT RISKS THAT A REPOSITORY WILL NEVER BE ESTABLISHED.

Respondent NRDC and supporting *Amici* has shown in detail that significant risks to the environment are present because of the fact that no waste disposal repository now exists, and there is no assurance that one will ever be established. We intend to concentrate on one aspect of this issue which is of special interest to KASE members.

In the 1960's the Atomic Energy Commission studied the inactive salt mines at Lyons, Kansas as possible high level waste disposal site. (J.A. at 167-68, 173, 183-84, 247-48, 273-74) It conducted some experiments at the mine, and based upon the results decided to make the Lyons site a permanent repository for some high level waste. (J.A. at 168) When geologists from the Kansas Geological Survey investigated the site, however, they found serious technical problems with the AEC proposal. (*Id.*) Specifically, they found that numerous bore holes had been drilled in the area and that no record had been kept as to where the holes had been drilled. (J.A. at 247-48) In addition, there was a commercial salt mining operation near to the site, and concern was expressed that water may migrate from one to the other. (J.A. at 168) In fact, the mining operation had reported water loss, which in-

dicated that there could be cavities that connected to the Lyons mine itself. (J.A. at 168, 247)

These technical problems prompted one geologist to contact Joe Skubitz, the United States Congressman from Kansas and Kansas Governor Robert Docking. These persons along with the local public put such extreme pressure upon the AEC that in 1972 it decided to abandon the project.[13] (J.A. at 168)

With this as a factual background, we wish to raise the following point: since Lyons represents the one attempt where the AEC actually selected a specific site for a repository, it would seem that the experienced gained there raises the significant risk that a permanent repository will not be found, at least in the near future. Why? Because Lyons shows that if the public around a site and their political representatives decide that they do not want the site in that area, it may be very difficult to have the repository established there.[14]

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13. In 1971-72, Congressman Skubitz arose repeatedly on the floor of the House and vigorously attacked the AEC proposal. A reading of Congressional Record and the numerous editorials, articles, reports and documents read into it by Skubitz indicates that the public and political opposition against the proposal was so intense that it is doubtful whether a repository could have been established in Kansas regardless of the geological findings at Lyons. See, e.g., 117 Cong. Rec. 4338-4344 (March 1, 1971); 6857-6869 (March 17, 1971); 21468-69 (June 22, 1971); 118 Cong. Rec. 40-42 (Jan. 18, 1972); 512 (Jan. 20, 1972); 4128-29 (Feb. 16, 1972).

14. The Commission and the Petitioners no doubt would respond that it was only the Lyons technical problems that created the public and political opposition, and in the future this will not occur because the technical problems will have been solved. Our history is replete, however, with instances of public and political opposition to a scientific endeavor because of a fear of the project, even though that fear may ultimately prove to be unfounded (which we, of course, deny is the case with the fear created by the uncertainties of nuclear waste).

To find additional support for this proposition one need look no further than the recently passed Nuclear Waste Policy Act of 1982, Pub. L. No. 97-425, 96 Stat. 2201 *et seq.* (1983). Sections 116 & 118 of the Act give States and Indian Tribes the right of disapproval, i.e. veto, of a site within their respective borders. It takes a joint resolution of Congress to override such a veto. It is possible, therefore, that an actual site for the repository will never be found, or at least, given the political maneuverings, a site may not be found in the very near future.[15] If this occurs, then the environmental effects of the generation of nuclear waste will directly impact each individual power plant. As noted before, Respondent, NRDC, and supporting *Amici* have analyzed in detail these impacts, some of which are site-specific, which analysis we fully support.[16] Table S-3 does not allow these effects to be considered in individual licensing proceedings. NEPA requires that these effects be considered in the decisionmaking process in a way that can affect the licensing proceedings.[17] Therefore, the decision to adopt the zero-release value in Table S-3 was arbitrary and capricious and not in accordance with law.

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15. The Lyons experience clearly shows that this is a realistic possibility. *See* 117 Cong. Rec. 4338-4344 (March 1, 1971).

16. The Nuclear Waste Policy Act envisions that interim storage of spent nuclear fuel will create environmental effects at the individual sites, and explicitly requires an EIS to be prepared if more than 300 metric tons will be stored on site. Section 135 (42 U.S.C. §10155).

17. *Andrus v. Sierra Club*, *supra*, 442 U.S. at 349-351; SIPI, *supra*, 481 F.2d at 1091-92; *Calvert Cliffs'*, *supra*, 449 F.2d at 1118.

CONCLUSION

The Original, Interim, and Final versions are all invalid because they ignore significant risks and uncertainties regarding the generation of nuclear waste. Therefore, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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